APPENDIX

REMARKS BEFORE THE FEDERAL BAR ASSOCIATION, SEPTEMBER 8, 1966

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In deciding what to talk about tonight, I had to make a choice between substance and procedure. Like most regulatory lawyers, I am interested in the substance of what our agency does—but my primary task is procedural—at least that is what our policy staff wants me to believe. In any event, for the purposes of this evening, I will avoid the substance of aviation regulatory policy. I will try to abstract some developments in the Board's legal work which may have general significance for administrative law.

Perhaps the most significant development at the Board has been the increased accent on rule making. Like all regulatory agencies, the CAB faces the dilemma of doing things expeditiously, but doing them with sufficient safeguards to protect individual rights. When we follow adjudicatory procedures, with a full evidentiary hearing, the price we pay in terms of delay is high. Consequently, we try to use rule making whenever possible, to speed things up.

One of the most successful examples of this practice relates to fixing minimum rates for services to the military establishment. Fortunately we were able to fix these rates without an adjudicatory hearing, because we did so as a condition to the exemptions we granted for engaging in the business. In contrast, ordinary commercial rates for passengers or cargo can only be prescribed after full hearing.

In the past year, the Board fixed minimum rates for military business totaling some 400 millions of dollars—to the satisfaction of the air carriers and the military services—and with nothing more than conventional rule-making procedures. By rule making, the Board was able to establish a whole new rate level and structure on July 1, 1965. Later, by rule making in February 1966, the Board was able to make major adjustments in these rates to reflect new economic conditions. I think this experience in rate making is very illuminating when we compare it with the strictures imposed by statute on regulation of commercial rates. Only once has the Board attempted to prescribe the general level of passenger fares after full evidentiary hearing—it took years to go through the procedures; and at the end of the case, the conditions in the industry had so radically changed that the Board did not attempt to prescribe the permissible level of rates.

A recent decision of the Court of Appeals for the D. C. Circuit, sitting *en banc,* holds great promise for expanded use of rule making. I refer to *American Airlines* v. *Civil Aeronautics Board* decided in March of this year. The case arose in connection with a regulation dealing with blocked-space service—the carriage of cargo at reduced rates where the shipper agrees to pay for a specified amount of space on a regularly recurring basis, whether he uses it or not. The regulation stated that it was the policy of the Board to permit only the all-cargo carriers to provide such service. Under the regulation, the combination carriers—carriers authorized to carry passengers, cargo, and mail—would not be permitted to provide blocked-space service. Acting under this regulation, the Board accepted blocked-space tariffs from the all-cargo carriers, but rejected similar tariffs of the combination carriers. On appeal, the combination carriers contended that the Board's action amounted to a modification of their existing licenses to carry freight. Modifications of certificates of public convenience and necessity may be made only after an ad-

judicatory hearing. The court sustained the Board's action even though the rule had diminished the licenses of the combination carriers without hearing.

Although the court's action was by no means without precedent, the blocked-space decision is of considerable significance in the light which it throws on the scope of rule-making authority. The opinion of Judge Leventhal goes to some length to suggest the ground rules that the court will follow in its sympathetic approach to rule making:

First, where the agency acts to lay down general standards, prospective in operation, and applicable to a broad class of persons, there will be a presumption in favor of the use of rule making, in the absence of some clear indication that Congress intended otherwise.

Secondly, rule making can be used even where the effect is to take action which would benefit one class of persons at the expense, so to speak, of another.

Thirdly, even where there are significant disputes of fact, a hearing prior to promulgation of a rule may not be required if the disputed facts turn on economic forecasts involving expert opinions. In the blocked-space case, the court found that no oral hearing was required. The combination carriers had urged a hearing to determine the impact of the blocked-space service on their business, but the court considered that that issue involved "legislative" rather than "adjudicative" facts. In the court's words, it was the kind of an issue "involving expert opinions and forecasts which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearings."

In this connection, the opinion points out that the fair functioning of the rule-making process requires that rules be subjected to re-examination on the basis of experience. The court emphasized that it is the obligation of the agencies to make appropriate re-examinations and adjustments.

Since this case is before the Supreme Court on petition for writ of certiorari, we cannot be certain that the *en banc* decision of the Court of Appeals is final. However, I believe the text of the opinion is very illuminating in terms of the court's general attitude toward rule making.

I would now like to turn to the Board's problems in the field of adjudication. Many of you are aware of Judge Friendly's criticism of the administrative agencies and his call for a Better Definition of Standards.

The ideal, of course, is that the agency should decide cases on the basis of principles and policies having continuing validity from one case to the next. The demand is that the agency articulate the principles and policies by which it is guided, so that an impartial onlooker, knowing the facts of a particular case, will be able to predict with a fair degree of accuracy how the case will be decided.

I am sure there is no one at the Board who does not share this ideal. But there is no area in which there is a greater gap between what would be ideally desirable and what is possible. The standards which Congress has given the Board are the "public interest" and the "public convenience and necessity." These have been coupled with a set of more specific goals such as the preservation of "the inherent advantages of" air transportation; "fostering sound economic conditions in" air transportation; "competition to the extent necessary" to achieve these goals, and the like.

In specific cases that come before the Board, these general considerations more often compete than coincide, and the problem is to work out the best possible accommodation among them. That can hardly be done by exalting one factor above all the others, or declaring in advance that one factor will be assigned a given weight in every case, regardless of what else the evidence shows. Nor can the Board simply rely on its past decisions for precedents

which will automatically fit new cases, especially where the agency has to regulate an industry which is in so rapid a state of flux.

Two recent cases which illustrate this problem are *City of Lawrence* v. *Civil Aeronautics Board* and *Outagamie County* v. *Civil Aeronautics Board.* Both involve Board decisions requiring nearby cities with their own airports to be served through a single airport.

In the *Lawrence* case, the Board had consolidated or eliminated poorly patronized air service at a number of New England communities. Two of those communities appealed, and one of them, New Haven, succeeded in convincing the Court of Appeals for the First Circuit that an injustice had been done.

To us at the Board, the majority opinion of the court in the *Lawrence* case was disturbing not so much because the Board was reversed—we don't claim to be infallible—but because of what the opinion suggested for the future. For instance, the court held, after citing Judge Friendly's thesis, that failure to articulate specific decisional standards leads straight to arbitrary action. Did that mean that the Board could no longer follow its traditional method of weighing the favorable factors against the unfavorable in each case? Did it mean that *no* valid decision could be arrived at until the Board adopted and published a set of decisional rules for area airport cases? When the Board reopened the *New Haven* case, the New Haven petitioners contended just that.

Similarly, the court in the *Lawrence* case charged the Board with departing without explanation from its earlier cases. But the allegedly inconsistent prior cases were all quite different on their facts, and none of them purported to lay down any hard-and-fast rules by which all subsequent cases were to be decided. Did the opinion mean that, before the Board could render any further decisions in this field, it must stop and reconcile all of its prior cases?

In this setting, we approached the *Outagamie* case. There, as in *Lawrence*, the Board had consolidated air service to several pairs of Wisconsin communities at area airports, and three of the cities losing home-airport service appealed. The Board's order explained the Board's decision in much the same terms as had the order upset in *Lawrence*.

Yet the *Outagamie* decision upheld the Board on every point—and did so in broad language vindicating the Board's decisional process. The Seventh Circuit held it entirely proper for the Board to decide by the weighing and balancing of factors. It found the demand for standards to be adequately met by the Board's announcement in advance of the factors which would be considered. But it held that any one factor need not be given the same weight in all cases, and may indeed be given no weight at all where other factors are found decisive. Nor need the Board make findings as to each of the factors concerning which evidence has been adduced.

As for prior decisions, the court held that the Board need not undertake to distinguish them where they are not substantially identical on their facts with the present case. And it added an explicit recognition of the Board's need for flexibility of decision, to meet changing conditions in a fast-developing industry.

We at the Board think that *Outagamie* is a better decision than *Lawrence*, and we see some signs in more recent cases that the former is the view that will prevail. But we are under no illusion that we can relax our efforts to develop better decisional standards where the subject matter permits.

It may well be that the Board could make more use of rule making for this purpose. I have already talked about rule making as a means of carving out categories of license applications that could be denied without an adjudicatory

hearing. I have also discussed the blocked-space type of rule making that permits a diminution in the existing rights of a given class of licenses, without a hearing. A third type of rule making that could be helpful would be a rule making that does not dispense with the need for adjudicatory proceedings, but either disposes of particular issues that are common to a class of adjudicatory proceedings, or at least specifies the factors that will be weighed in deciding issues subject to adjudication.